

Before the
Federal Communications Commission
Washington, D.C. 20554

REC'D MAIL ROOM
SEP 14 1998
RECEIVED

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For a Construction Permit for a New)	
FM Station on Channel 247A in)	
Homewood, Alabama)	
)	

TO: The Full Commission

EMERGENCY MOTION FOR STAY, PENDENTE LITE

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SUMMARY

This is a case in which two applicants for a construction permit for a new FM broadcast station at Homewood, Alabama (Homewood Partners, Inc. ("HPI"), and WEDA, Ltd. ("WEDA")) have merged and formed a new company, Homewood Radio Co., L.L.C. ("HRC"). The Commission has approved a settlement between these two applicants and granted a construction permit to HRC, while denying the application of a third applicant (Heidi Damsky) on the grounds that Damsky is allegedly financially unqualified. Damsky has appealed the denial of her application to the U.S. Court of Appeals for the D.C. Circuit.

In this motion, Damsky shows that the Commission's actions should be stayed pending disposition of her appeal by the Court. She shows that she has a strong case on the merits because, inter alia, she complied with the standards set forth to establish her financial qualifications, set forth in a landmark Commission case; a case affirmed by the Court of Appeals, but never substantively addressed in the Commission's decision denying Damsky's application, notwithstanding Damsky's explicit reliance on that case in timely filed Exceptions.

Damsky further shows that she will suffer irreparable injury if the stay is not granted; that no harm will be done to the public interest or any private party by the issuance of the stay; and that the public interest will actually be served by issuance of the stay.

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TO: The Full Commission

EMERGENCY MOTION FOR STAY, PENDENTE LITE

Heidi Damsky ("Damsky"), by her attorney, hereby respectfully requests the full Commission to stay the effectiveness of its Order in this proceeding (FCC 98-202), released August 25, 1998, which denied a Petition for Reconsideration filed by Damsky on May 22, 1998, asking the Commission to reconsider its Memorandum Opinion and Order, FCC 98-81, released May 6, 1998, which denied Damsky's application for a construction permit for a new FM broadcast station at Homewood, Alabama; approved a settlement agreement between the two other applicants for the Homewood construction permit, i.e., Homewood Partners, Inc. ("HPI"), and WEDA, Ltd.

("WEDA"), and granted a construction permit to Homewood Radio Co., L.L.C. ("HRC"), a company owned by HPI and WEDA. A stay of effectiveness of the aforementioned Order is respectfully requested until the U. S. Court of Appeals for the D. C. Circuit has disposed of an appeal from the aforesaid actions of the Commission, filed by Damsky under date of September 2, 1998. The Commission is respectfully requested to act on this Emergency Motion for Stay, Pendente Lite, within 14 days. In support of all of the foregoing, it is alleged:

I. Preliminary Statement.

1. On May 6, 1998, the Commission issued a decision in this proceeding. In that decision, the Commission denied Damsky's application for a construction permit for a new FM broadcast station at Homewood, Alabama, on the grounds that Damsky was allegedly financially unqualified. In the same decision, the Commission approved a settlement whereby two of the applicants, WEDA, Ltd. and Homewood Partners, Inc., merged and formed a new entity, Homewood Radio Co., L.L.C. The Commission granted a construction permit to the merged entity.

2. On May 22, 1998, Damsky petitioned for reconsideration. In her petition, Damsky objected to her disqualification on financial grounds and objected to the merger and to a grant of the construction permit to the merged entity. Furthermore, Damsky showed that the merged entity has entered into a time brokerage agreement or "lease", whereby it is proposing to lease the station to Cox Radio, Inc. Damsky showed that Cox already controls more than 40% of the radio broadcasting revenues in the Birmingham market, so that the lease apparently violates the antitrust laws.

3. By Order, released August 25, 1998, and published at 1998 WL 526748, the Commission denied Damsky's Petition for Reconsideration. Under date of September 2, 1998, Damsky filed a Notice of Appeal with the U.S. Court of Appeals for the D.C. Circuit.

4. Damsky hereby respectfully requests the full Commission to stay the effectiveness of its above-described actions until the Court has had an opportunity to consider and dispose of Damsky's appeal. The requirements to obtain a stay are set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). There, the Court of Appeals enunciated a four part test for obtaining a stay. The movant must show that (a) the movant has a strong likelihood of success on the merits; (b) that movant will suffer irreparable injury if the stay is not issued; (c) that other parties interested in the proceeding will not be substantially harmed; and (d) where lies the public interest. In a subsequent case, however, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), the Court of Appeals modified the Virginia Petroleum test to provide that even in cases where an appellant is "less likely than not to prevail on the merits", a stay can still be issued and should be issued where there are other factors requiring a stay.

II. Likelihood of Success on the Merits.

5. In 1992, ALJ Joseph Chachkin released an Initial Decision, ruling that Damsky was not financially qualified to be a Commission licensee. ALJ Chachkin did not question Damsky's character; he had previously rejected a request that he add a false financial representation issue against Damsky. He merely found that Damsky had not crossed all of the required "t's" and dotted all of the required "i's" to establish her financial qualifications. Heidi Damsky, 7 FCC Rcd 5244 (1992).

6. On September 17, 1992, Damsky filed Exceptions to the Initial Decision; Exceptions which were originally directed to the Review Board but, the Board having been abolished in the interim, were eventually ruled upon by the full Commission in its Memorandum Opinion and Order, released May 6, 1998, and published at 1998 WL 219837, 12 Pike & Fischer RR 140.

7. Damsky's Exceptions were predicated, squarely, on the ALJ's failure to comply with the standards set forth in the famous case of Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075 (1990), aff'd sub. nom., Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). On September 12, 1997, however, WEDA and HPI filed a Joint Request for Approval of Settlement Agreement between them. In that Joint Request, WEDA and HPI made a new attack on Damsky's financial qualifications, making new arguments and pointedly avoiding the applicability of Northampton to Damsky's situation. In an Opposition, Damsky protested, asserting that she had a right to have her case evaluated on the basis of her timely filed Exceptions. In a Reply, however, HPI and WEDA suggested, in substance, that it wasn't really necessary for the Commission to go to all that trouble, since as they observed, "the Joint Parties were careful in the Joint Request to point to the record of the proceedings repeatedly, ensuring accuracy and an easy read for the Commission".¹ As it turned out, the Commission evidently chose to adopt the "easy read" approach, because the Commission utterly failed to address the applicability of Northampton to this proceeding.

8. As Damsky pointed out in her Exceptions, the findings of the ALJ with respect to Damsky's financial qualifications were fundamentally flawed, because the ALJ refused evidence which would have allowed Damsky to demonstrate that (a) she was qualified on the day when the application was filed; and (b) that she remains qualified today. The evidence showed that prior to filing her application, Damsky was told by her consulting engineer, William E. Bennis, III, that she would need approximately \$275,000 to \$300,000 to construct and operate her proposed station for

¹Reply to Consolidated Responses to Joint Request for Approval of Settlement Agreement, filed October 1, 1997, at p. 9.

three months with no revenues of any kind (Hear. Tr. 269, 1129). In point of fact, in August of 1988, when the application was filed, the balance sheet of Damsky's husband, Martin Damsky, showed that he had more than \$300,000 in cash and liquid assets (Hear. Tr. 1111). These included \$16,500 cash on hand; \$103,000 in listed securities²; \$140,000 in Damsky Paper Co. stock; and \$100,000 in cash in the company's profit sharing plan (F. 9; Damsky Ex. 10, pg. 3; Hear. Tr. 1094, 1110-11). The balance sheet also showed further that Mr. Damsky had no significant current liabilities (F. 8; Damsky Ex. 10, pg. 3). As Mr. Damsky testified, the monies shown as Damsky Paper Co. stock actually constituted his share of the retained earnings of the company, which were in the bank and available to him at any time (Hear. Tr. 1111-14). At the time Damsky's application was filed, Mr. Damsky owned 20% of Damsky Paper Co.; at the time of the hearing, Mr. Damsky testified that he owned 100% of Damsky Paper Co., and that the company was estimated to gross over \$18 million in 1991 (Hear. Tr. 1097, 1105-06).

9. Damsky asked her husband if this was something they could afford, and Mr. Damsky assured her that they could come up with the necessary funds and further advised his wife at that time that he would support her in whatever manner might be required in order to provide the funds needed to construct and operate the station (F. 9; Hear. Tr. 271, 1109-11).

10. The ALJ received Damsky Exhibit 10, except for pages 2, partially page 4 and page 5. Page 2 showed the exact costs to construct and operate the station. Rejection of this page to Exhibit 10 was error. Page 5 was a letter of credit, issued to Heidi Damsky by First Alabama Bank on June 20, 1991, showing that on the date of the letter the bank was willing to loan Damsky the sum of

² At hearing Mr. Damsky identified these securities as First Alabama Bank and Big B Drugs (Hear. Tr. 1090).

\$300,000, and that such a loan would also have been available to her in 1988. The rejection of page 5 of Exhibit 10 was also error.

11. Nevertheless, the evidence received at hearing showed that Damsky anticipated a need for \$300,000, and that she and her husband together had well over that amount in cash and liquid assets. The ALJ found that no cost estimates had been submitted. That was not really true. An itemization was submitted as Damsky Exhibit 10, pg. 2, but was rejected by the ALJ (Hear. Tr. 1172-73). While Damsky's estimate of her costs was not received in evidence, it should be noted that the cost figures were circulated as part of Damsky Exhibit 10 (F. 10); that the other parties to the proceeding had a full opportunity to request the consultant who prepared the estimate to appear and be cross-examined, but that no party made such a request and no evidence was introduced challenging the adequacy of the cost estimates (Hear. Tr. 1123-24).

12. A balance sheet was introduced as Damsky Exhibit 10, pg. 4, but was partially rejected (Hear. Tr. 1172-73). Damsky's credit letter was also rejected (Hear. Tr. 1172-73). These rulings were clearly erroneous. They crippled Damsky's efforts to establish her financial qualifications. Similarly, the ALJ erred in suggesting that, because Martin Damsky is liable on certain debts of the Damsky Paper Co., those indebtednesses should somehow be subtracted from the Damskys' liquid assets. Obviously, any bank or creditor would look first to the Damsky Paper Co. for repayment of any such loans, and only secondarily to Martin Damsky. Similarly, the ALJ erred in suggesting that Martin Damsky could not use certain of his liquid assets because of tax consequences. The standard established by the FCC to establish the financial qualifications of an applicant is the ability to construct and operate for three months with no revenues of any kind. When retirement accounts are used for the construction of a radio station, the tax bills do not normally have to be paid for many,

many months after the expiration of the initial three month operating period and should not, therefore, be deducted from an individual's assets. The ALJ erred when he found that Mr. Damsky had not expressed a willingness to withdraw his pension funds if necessary in order to provide funds for the construction and operation of the station. Mr. Damsky's testimony showed that he was 100% behind his wife and would have done whatever was necessary. However, as the bank letter demonstrates, he really did not need to rely on his liquid assets, because he had the requisite borrowing power at the bank (Hear. Tr. 1111-13).

13. The most egregious error committed by the ALJ was the exclusion of the bank letter, issued to Damsky by First Alabama Bank. That letter clearly complied with current Commission requirements. Scioto Broadcasters, 5 FCC Rcd 5158 (Rev. Bd. 1990). However, the ALJ refused to receive the letter in evidence (Hear. Tr. 1171-72). Damsky cannot understand the disparity of treatment meted out to her by the ALJ as opposed to the ALJ's exceedingly lenient treatment of HPI (Homewood Partners, Inc.).³

14. In Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075 (1990), aff'd sub nom. Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991), the Commission dealt specifically with the situation presented here, where an applicant filed on the "old" Form 301, which did not require an applicant to include in the application either an estimate of costs or showing of sources of funds to meet those costs. In Northampton, the Commission said the following at ¶14:

"Nevertheless, as the Commission explained in Certification of Financial Qualifications, 2 FCC Rcd at 2122, the certification procedure was designed to

³The ALJ allowed HPI to amend its application to substitute a corporation for a partnership, allegedly to enable HPI to establish its financial qualifications.

'spare[] [applicants] the time and effort necessary to prepare and submit the documentation previously required to demonstrate their qualifications.' (emphasis added). In this manner, the certification procedure was intended to 'provide[] significant benefits both to applicants and to the Commission.' Id. Cf. Metromedia Radio & TV, 102 FCC 2d 1334, 1350-52 ¶¶ 30-32 (1985) (usual practice is not to require the assignee, who certified its financial qualifications, to produce the detailed documentation that would have been required prior to 1981). Thus, we conclude that, under the 1981 requirements governing certification cases like the one before us, reasonable assurance does not necessarily require that an applicant have the written documentation (which would have been required before the 1981 revision of FCC Form 301) when it certifies its financial qualifications. Although the supporting documentation must be produced upon the Commission's request, the applicant may prepare and submit it after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification." 4 FCC Rcd at 5519.

Thus, the rule would appear to be that an applicant may prepare and submit documentation supporting its certification at a time subsequent to certification, provided that the applicant actually had a reasonable assurance of available funds at the time of certification.

15. That is exactly the case here. Damsky knew from her consulting engineer that she needed up to \$300,000 to construct a station and operate it for three months with no revenues of any kind.⁴ That is a far more generous and conservative estimate than was involved in the Northampton case. There, the applicant, Cutter, was proposing to construct and operate the entire station for a total cost of only \$38,836. See, Northampton at ¶5. In any event, the Damskys actually had cash

⁴ HPI argued at fnnt. 12 to its reply findings that, because William E. Bennis, III was not presented for testimony, the figure which he gave to Damsky was suspect, citing United Broadcasting Corp., 53 RR 2d 57 (1983). HPI forgot that in Damsky Exhibit 10, pg. 2, a complete itemization of the costs comprising the figure was set forth and that it was known from prior testimony that Damsky got her figures from Mr. Bennis. Thus, if any party had wanted to cross-examine Mr. Bennis, they could have requested him to appear and Damsky would have been obliged to make him available (F. 11; Tr. 1123-24). However, no party made such a request for the obvious reason that the figures supplied were reasonable and consistent with the estimates of the other two applicants in the proceeding, i.e., WEDA and Partners.

or cash equivalent well in excess of \$300,000. Thus, it would appear that Damsky clearly falls within the scope of an applicant who, under Northampton, "may prepare and submit [documentation] after certification, provided that the applicant actually had a reasonable assurance of adequate funds at the time of certification".

16. Upon reconsideration, in Northampton, the Commission's Mass Media Bureau sought to limit the case to those situations, e.g., Damsky's, where an applicant was relying upon a balance sheet. The full Commission, however, declined any such limitation, and made it clear that applicants, e.g., Damsky, could also document other financing, e.g., bank loans, even though the documentation was not available at the time of filing of the original application. It said:

"The Mass Media Bureau has also filed a petition for reconsideration of that aspect of our decision which held that the certification procedure does not require applicants to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications. In its petition, the Bureau urges us to modify that holding so as to limit its application to applicants, such as Cutter, who rely solely on the personal resources of their principals. All other applicants, the Bureau submits, should be required to have contemporaneous written documentation to support their financial plans when certifying their financial qualifications.

Although the Bureau contends that the public interest would be best served by granting reconsideration, it has provided no basis for the disparate treatment of applicants that it purposes and we find none ourselves. Nor does the Bureau show why the evidentiary submissions demonstrating that the applicant was financially qualified at the time its application was filed, as specified by our decision herein, are insufficient to meet the requirements of the certification procedure. More importantly, given the previous clear indications that an applicant need not prepare the documentation contemplated by the certification procedure requirements until requested to do so, 4 FCC Rcd at 5518 para. 14, we believe that there is no valid basis for such an approach. In view of the foregoing, we will deny the Bureau's petition." 5 FCC Rcd 3075 at paras. 6-7.

Thus, Damsky's bank letter was also clearly admissible under Northampton, so long as the bank financing was available at the time her application was filed – a fact confirmed by the bank letter,

itself (see letter, copy attached and marked Exhibit A).

III. Irreparable Injury.

A. Damsky Will Suffer Irreparable Injury if the Stay Is Not Issued.

17. Damsky will suffer irreparable injury if this stay is not issued. This is not an ordinary situation in which an applicant has simply lost a comparative hearing and the winner of the hearing is taking its construction permit, subject to possible appeals by the loser. Rather, this is a situation in which a third party, Cox Radio, Inc., has for all practical purposes already purchased the construction permit awarded to HRC and is rushing "hell bent for election" to make a large investment in the station and get it on the air.

18. Attached and marked Exhibit B is a copy of an article which recently appeared in the Birmingham News. As the article makes clear, Cox is even now commencing station construction pursuant to a time brokerage agreement or "lease" under which Cox will control all of the programming of the station, except for one hour per week, to be retained by HRC, apparently for purely cosmetic purposes.

19. On July 8, 1998, while Damsky had a motion for stay pending before the Commission, asking the Commission to stay its grant of the HRC application until it could act on a pending Petition for Reconsideration filed by Damsky, two attorneys representing HRC walked into the offices of John Riffer, the Associate General Counsel of the Commission. The purpose of their visit was to solicit Riffer's assistance in persuading the FCC staff to issue a construction permit to HRC, notwithstanding the pendency of Damsky's motion and petition. The attorneys for HRC falsely represented to Mr. Riffer that the ex parte rules did not apply to their presentation. Mr. Riffer, to his great credit, recognized that this was not the case and directed a Memorandum to the Associate

General Counsel -- Administrative Law Division, disclosing the entire incident (see, Further Petition to Enlarge Issues and to Remand for Further Hearing Proceedings, filed by Damsky under date of July 28, 1998).

20. Nonetheless, the attorneys for HRC persisted and, on August 6, 1998, in violation of long established Commission policy, the Commission staff issued a construction permit to HRC, even though the Commission had not yet disposed of Damsky's motion for stay and/or Petition for Reconsideration. Thus, pursuant to the arrangement between HRC and Cox Radio, disclosed in the Joint Request for Approval of Settlement Agreement, filed on September 12, 1997, Cox is already advancing money for the construction of the station and will soon put the station on the air. Under these circumstances, Cox Radio will certainly claim equities resulting from the expenditure of large sums of money. The Commission should cut these claims off at the pass and issue a stay, so that Damsky may pursue her judicial appeal without being confronted by claims by third parties, e.g., Cox Radio, that they will be prejudiced if the Court of Appeals grants the relief which Damsky is seeking.

B. Public Interest.

21. The public interest will be served by a grant of the stay. Homewood, Alabama, is a close-in suburb of Birmingham, Alabama, a market already well served by multiple radio broadcasting stations. Because of the arrangement between HRC and Cox Radio, HRC cannot possibly suffer any financial loss as a result of the grant of the stay. Cox Radio is picking up the tab for everything. On the other hand, as Damsky demonstrates in her Petition for Reconsideration, filed with the Commission on May 22, 1998, Cox Radio, itself, already has several existing broadcast properties in the Birmingham market and, indeed, there is a serious question as to whether the

operation of the Homewood station by Cox Radio constitutes a violation of the antitrust laws, because it gives Cox Radio a dangerously large share of the radio broadcasting audience and revenues in the Birmingham market. Cox Radio will not suffer if a stay is issued, since it already dominates the Birmingham market through the other stations which it controls in that market. The public, however, will benefit if Cox Radio is not allowed to acquire an additional property in that market, thereby enabling Cox Radio to further enhance its market power and administer the rates charged to radio advertisers in the Birmingham market.

WHEREFORE, it is respectfully requested that the full Commission stay the effectiveness of its Order in this proceeding (FCC 98-202), released August 25, 1998, until such time as the U.S. Court of Appeals for the D.C. Circuit has had an opportunity to dispose of Damsky's appeal. The Commission is respectfully requested to act on this motion for stay within 14 days.

Respectfully submitted,

September 11, 1998

HEIDI DAMSKY

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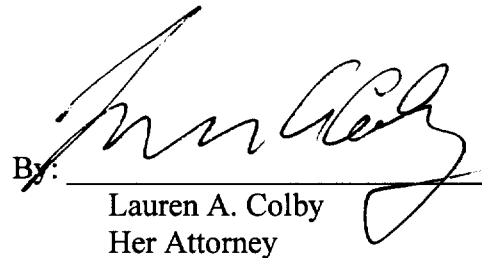
By: 
Lauren A. Colby
Her Attorney

EXHIBIT A

June 20, 1991

R. A. Montgomery, Jr.
Senior Vice President

Mrs. Heidi Damsky
3508 Mill Run Road
Mountain Brook, Al 35223

Dear Mrs. Damsky,

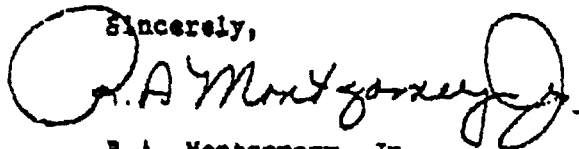
I understand that you are applying to the FCC for a construction permit for a new FM broadcast station to be situated in Homewood, Alabama, and that you may require a loan of up to \$300,000.00 for use in connection with the construction and initial operation of the proposed station.

My initial review indicates you do qualify for a loan of \$300,000.00 secured by the signatures of you and your husband, Martin, and by a second mortgage on your residence. Furthermore, the loan would be secured by a pledge of the stock which you and your husband own in Damsky Paper Company. The loan would bear interest at the rate of First Alabama Bank Base plus 1% and repayable in sixty equal monthly installments of principal and interest.

I understand that you do not require a binding commitment and this letter is not a binding commitment. It will, however, provide you with reasonable assurance of the availability of those funds. The availability of the loan will depend upon a review of your financial statement and that of your husband at the time when the funds are actually requested.

Our bank has had a financial statement on hand for Martin Damsky, for a period of years and we had such a statement on file as of June 1, 1988. I have reviewed that statement, as well as the current statement and I hereby advise you that, as of June, 1988, our bank would have written you a letter identical to this one.

Sincerely,



R.A. Montgomery, Jr.

RAM/dk

EXHIBIT B

New radio station gets OK to enter agreement

By Lori Chandler
News staff writer

A new Homewood-based FM radio station has the OK to enter into a local marketing agreement with Cox Radio Inc. to begin building the station.

"We could be up and running as soon as two months," said Ouida Fritschl of the Homewood Citizens Association, a Homewood City Council watcher and one of the partners in Homewood Radio Co.

Under an order issued April 30 by the Federal Communications Commission, WDDA-LP, and "Homewood Partners" merged to form Homewood Radio Co. The order also allows Cox to provide Homewood Radio Co. with a \$1 million line of credit for the construction of the station. The next step for the station is to get a license.

Cox will provide programming and local advertising revenues, and pay \$12,000 a month in rent to the partnership, the order says. The company has not said what programming format will be used.

The agreement also gives Mrs. Fritschl and Homewood Partners an hour each a week for local radio programming. Mrs. Fritschl said her program will focus on Homewood issues as well as other matters.

"I started this to give the little people a voice, and provide an avenue for people to learn how to work through city government," Mrs. Fritschl said. "I'm also interested in other cities and the issues they deal with, too."

Cox will have the option to purchase the station for \$5.5 million, the order says.

The process to get the station began 18 years ago, while Mrs. Fritschl was running for a City Council seat. She said she first wanted the station because she believed there were problems with city leadership in the late 1980s, and although she said things have changed, the need for such a program is still there.

"We will be able to make public interest announcements, it will be a program where people can call us directly and we will have guests," she said.

Mrs. Fritschl said she hopes other communities will be able to garner information from the program. "I hope communities with problems such as union board appointments, politicians, whatever, feel that this will be a place where they can listen," Mrs. Fritschl said.

Cox ranks as one of the nation's top 10 radio companies and has ties to six radio stations in the Birmingham market. Radio stations under the Cox umbrella include country station WZZK (104.7 FM), urban contemporary station WODL (106.5), urban contemporary station WBLI (95.7), jazz station WJAZ (92.7), and classic soul station WBBK (94.7). KISS FM.

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 11th day of September, 1998, to the offices of the following:

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